

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ARMIS ARRENDONDO,)
Petitioner,) 2:07-cv-1312-JCM-GWF
vs.) **ORDER**
D.W. NEVEN, *et al.*,)
Respondents.) /

This action is a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by Amris Arrendondo, a Nevada state prisoner. Pending before the court are respondents' motion to dismiss (docket #18), petitioner's opposition (docket #25), and respondents' reply (docket #26).

I. Procedural History

On December 18, 2003, the state sought a grand jury indictment against petitioner for one count of possession of a stolen vehicle and one count of possession of stolen property. (Exhibit 2).¹ The indictment warrant was issued on December 19, 2003. (Exhibit 5). Petitioner filed a state habeas petition on December 2, 2004. (Exhibit 9). On December 15, 2004, petitioner elected to represent himself subsequent to a *Faretta* canvas. (Exhibit 21). The court found that petitioner was

¹ The exhibits referenced in this order are found in the court's record at docket #19-21.

1 competent to waive his right to counsel. (*Id.*). On February 1, 2005, petitioner filed a petition for a
2 writ of mandamus with the Nevada Supreme Court, which the court denied. (Exhibits 28 and 29).
3 On March 8, 2005, the district court denied the habeas petition. (Exhibits 33 and 34).

4 Petitioner's two-day trial, at which petitioner represented himself, began on March
5 21, 2005. (Exhibits 36 and 37). The jury found petitioner guilty on both counts. (Exhibit 39).

6 On March 24, 2005, the state filed a notice of intent to seek punishment as a habitual
7 criminal. (Exhibit 40). On April 4, 2005, petitioner filed a motion to appoint counsel, which he then
8 withdrew on April 19, 2005. (Exhibits 44, 50, and 55).

9 On April 19, 2005, petitioner filed an "amended information to seek relief via appeal
10 of writ of habeas corpus." (Exhibit 49). Petitioner filed other motions on April 26, 2006. (Exhibits
11 51-53).

12 On April 28, 2005, petitioner was sentenced as a habitual criminal to a life sentence
13 with parole eligibility at ten years on each count, to run concurrently. (Exhibit 54).

14 On May 3, 2005, the district court denied petitioner's motions for appeal from the
15 writ of habeas corpus and motion for a new trial. (Exhibits 56 and 57).

16 Petitioner filed his notice of appeal to the Nevada Supreme Court on May 4, 2005.
17 (Exhibit 59). The Nevada Supreme Court remanded the case for the purpose of appointing counsel.
18 (Exhibit 60). Counsel was appointed on June 14, 2005, and entered an appearance on June 20, 2005.
19 (Exhibits 61-63).

20 On August 10, 2005, petitioner filed a pro per appeal and/or "amended information
21 for a writ of mandamus," which was denied by the Nevada Supreme Court on August 31, 2005.
22 (Exhibits 64 and 65).

23 Counsel for petitioner filed his opening brief on December 19, 2005, alleging three
24 grounds for relief. (Exhibit 69). The three grounds for relief were as follows: (1) the state's failure
25 to advise the district court that petitioner might be charged as a habitual criminal made his waiver of
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1 counsel invalid; (2) the district court erred when it failed to permit petitioner adequate time to
 2 produce his trial witnesses; and (3) the district court abused its discretion in awarding petitioner only
 3 2 days credit for time served, as he had been incarcerated 577 days prior to sentencing. (Exhibit 69).
 4 On April 4, 2006, petitioner filed a motion to dismiss counsel and for the appointment of alternate
 5 counsel. (Exhibit 72). The Nevada Supreme Court denied petitioner's pro per motion to remove
 6 counsel. (Exhibit 73).

7 On June 29, 2005, the Nevada Supreme Court issued an order affirming in part and
 8 remanding, in which petitioner's first two claims were denied. (Exhibit 74). The Nevada Supreme
 9 Court ruled that the district court erred in granting petitioner only two days credit for time served,
 10 and remanded the case to district court for a rehearing on that issue. (Exhibit 74). Remittitur issued
 11 on July 25, 2006. (Exhibit 75). After a hearing on July 27, 2006, the state filed an amended
 12 judgment of conviction, amending petitioner's sentence to credit him with 577 days credit for time
 13 served. (Exhibit 76).

14 Petitioner filed a federal habeas petition in this court on October 27, 2006, as case
 15 number 2:06-cv-1369-PMP-GWF. That petition was dismissed without prejudice. (2:06-cv-1369-
 16 PMP-GWF at Docket #2). Petitioner then re-filed his federal petition on September 26, 2007, under
 17 the instant case number. Petitioner's original petition in the instant action alleges two grounds for
 18 relief. (Docket #1).

19 By order filed June 20, 2008, the court granted petitioner's unopposed motion for
 20 leave to file an amended petition. (Docket #16). The court directed petitioner to file an amended
 21 petition within thirty days. (*Id.*).

22 On June 17, 2008, petitioner filed a "motion for leave of court to file [an] extended §
 23 2254 [petition]." (Docket #13). A supplemental habeas petition, which added seventeen grounds to
 24 the two grounds in the original petition, was attached to the motion. (Docket #13). Respondents
 25 opposed the granting of petitioner's motion to file an extended § 2254. (Docket #14).

1 By order filed August 21, 2008, the court granted petitioner's motion to amend and
 2 directed the clerk of court to file the amended (supplemental) petition that was attached to
 3 petitioner's motion. (Docket #23). The court directed respondents to file a response to all of the
 4 grounds raised in the original petition and the amended petition. (Docket #23). The amended
 5 (supplemental) petition was filed by the clerk on the same date, August 21, 2008. (Docket #24).

6 One day earlier, respondents filed the instant motion to dismiss. (Docket #18).
 7 Because the motion addresses all twenty-one grounds presented in the original and amended
 8 petitions, the motion is not moot and its merits will be addressed in this order.

9 **II. Discussion**

10 **A. Grounds One and Two (Original Petition, Docket #4)**

11 In ground one, petitioner asserts a violation of his right to counsel, alleging that the
 12 waiver of his right to counsel was not knowing and intelligent because he was not made aware of the
 13 State's intent to seek application of the habitual criminal statute. (Docket #4). Respondents concede
 14 that ground one of the petition is exhausted. (Docket #18, at p. 6).

15 Respondents argue that ground two of the federal petition was raised in the state
 16 courts only in the context of a state claim, not a federal constitutional violation. In ground two,
 17 petitioner alleges that his Sixth and Fourteenth Amendment right to compulsory process was violated
 18 because his witnesses did not receive subpoenas in time to testify in court. (Docket #4). In his direct
 19 appeal, petitioner alleged that the district court erred by not granting him adequate time to produce
 20 witnesses in his defense. (Exhibit 69, at pp. 6-9). In his direct appeal claim, petitioner did not claim
 21 any federal constitutional violation or refer to any federal case to imply that he was making a federal
 22 constitutional claim. (*Id.*).

23 A federal court will not grant a state prisoner's petition for habeas relief until the
 24 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S.
 25 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on
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1 each of his claims before he presents those claims in a federal habeas petition. *O'Sullivan v.*
 2 *Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim
 3 remains unexhausted until the petitioner has given the highest available state court the opportunity to
 4 consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
 5 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

6 A habeas petitioner must “present the state courts with the same claim he urges upon
 7 the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional
 8 implications of a claim, not just issues of state law, must have been raised in the state court to
 9 achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404
 10 U.S. at 276)). To achieve exhaustion, the state court must be “alerted to the fact that the prisoner [is]
 11 asserting claims under the United States Constitution” and given the opportunity to correct alleged
 12 violations of the prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala*
 13 *v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a
 14 simple and clear instruction to potential litigants: before you bring any claims to federal court, be
 15 sure that you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.
 16 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)). A claim is not exhausted unless the
 17 petitioner has presented to the state court the same operative facts and legal theory upon which his
 18 federal habeas claim is based. *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir.
 19 1994).

20 In the instant case, as to ground two, petitioner did not present this claim as a federal
 21 constitutional claim to the Nevada Supreme Court. In arguing that the district court erred by failing
 22 to permit him adequate time to produce trial witnesses, petitioner did not claim a federal
 23 constitutional violation. (Exhibit 69, at pp. 6-9). Rather, in the opening brief, petitioner argued and
 24 cited Nevada state law. (*Id.*). Petitioner failed to recite the factual and legal basis for a federal
 25 constitutional violation. In the federal petition, petitioner has changed the operative legal theory of
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1 the claim to allege a federal constitutional violation. (Petition, at Docket #4). As such, ground two
 2 of the petition has not been properly exhausted in state court.

3 **B. Grounds 3-19 (Supplemental/Amended Petition, Docket #24)**

4 Respondents point out that the claims raised in grounds three through nineteen of the
 5 supplemental/amended petition were not exhausted in state court. In petitioner's direct appeal to the
 6 Nevada Supreme Court, he raised two grounds for relief. (Exhibit 69). Petitioner now adds
 7 seventeen new claims in his supplemental petition. (Docket #24). Because none of these claims
 8 were presented to the Nevada Supreme Court, they are unexhausted. *See Duncan v. Henry*, 513 U.S.
 9 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999).

10 Additionally, respondents assert that grounds three through nineteen are time-barred
 11 under the AEDPA statute of limitations. The Antiterrorism and Effective Death Penalty Act
 12 (AEDPA) amended the statutes controlling federal habeas corpus practice to include a one-year
 13 statute of limitations on the filing of federal habeas corpus petitions. With respect to the statute of
 14 limitations, the habeas corpus statute provides:

15 (d)(1) A 1-year period of limitation shall apply to an application
 16 for a writ of habeas corpus by a person in custody pursuant to the
 17 judgment of a State court. The limitation period shall run from
 18 the latest of—

19 (A) the date on which the judgment became final by the
 20 conclusion of direct review or the expiration of the time
 21 for seeking such review;

22 (B) the date on which the impediment to filing an
 23 application created by State action in violation of the
 24 Constitution or laws of the United States is removed, if the
 25 applicant was prevented from filing by such State action;

26 (C) the date on which the constitutional right asserted was
 27 initially recognized by the Supreme Court, if the right has
 28 been newly recognized by the Supreme Court and made
 29 retroactively applicable to cases on collateral review; or

30 (D) the date on which the factual predicate of the claim or
 31 claims presented could have been discovered through the
 32 exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

4 28 U.S.C. § 2244(d). Petitioner was sentenced on April 28, 2005. (Exhibit 54). The Nevada
5 Supreme Court issued its decision denying the direct appeal on June 29, 2006. (Exhibit 74).
6 Remittitur issued on July 25, 2006. (Exhibit 75). The judgment became final on June 25, 2006.
7 Adding ninety days to that date, petitioner had one year to file a federal petition, and that one year
8 began to run on October 23, 2006. Petitioner filed a federal habeas petition on October 27, 2006, in
9 case number 2:06-cv-1369-PMP-GWF. That petition was dismissed without prejudice. Petitioner
10 filed the petition in the instant case on September 26, 2007. While the original petition is timely, any
11 filing after September 26, 2007, would be untimely unless it relates back to the claims alleged in the
12 original petition. Petitioner submitted the supplemental/amended petition on June 17, 2008, attached
13 to his motion to amend. (Docket #14). The court later directed the clerk to file the
14 supplemental/amended petition as a separate document. (Docket #24).

Under Federal Rule of Civil Procedure 15, an amended pleading “relates back” to the original pleading only if the acts described in the amended pleading are set forth in the original pleading. Fed. R. Civ. P. 15(c)(2). An amended habeas petition only relates back if the amended claims are tied to the “same core of operative facts” as alleged in the original petition. *Mayle v. Felix*, 545 U.S. 644, 664 (2005). In *Mayle*, the petitioner originally raised only a Confrontation Clause claim in his habeas petition, based on the admission of video-taped prosecution witness testimony. 545 U.S. at 648-49. After the one-year AEDPA statute of limitations had passed, petitioner then sought to amend his habeas petition to allege a Fifth Amendment claim based on coercive police tactics used to obtain damaging statements from him. *Id.* The factual basis for each claim was distinct. Petitioner then argued that his amended claim related back to the date of his original habeas petition because the claim arose out of the same trial, conviction or sentence. *Id.* at

1 659-661. In rejecting petitioner's argument the Supreme Court held that if "claims asserted after the
 2 one-year period could be revived simply because they relate to the same trial, conviction, or sentence
 3 as a timely filed claim, AEDPA's limitation period would have slim significance." *Id.* at 662.

4 In the instant case, grounds three through nineteen, contained in the
 5 supplemental/amended petition, were not raised in the original petition and are not tied to a common
 6 core of operative facts. Grounds three through nineteen are distinct from the claims in the original
 7 petition and do not relate back to the original petition. Accordingly, grounds three through nineteen,
 8 contained in the supplemental/amended petition, are dismissed as untimely.

9 **III. Petitioner's Options**

10 As discussed above, ground two of the petition is unexhausted, while respondents
 11 concede that ground one of the petition is exhausted. Because the court finds that the petition is a
 12 mixed petition, containing both exhausted and unexhausted claims, petitioner has options. In the
 13 past, it has been the practice of this court to permit a petitioner the option of abandoning his
 14 unexhausted claims and proceeding on the merits of those that are properly exhausted or voluntarily
 15 dismissing the action without the entry of judgment, to permit a return to state court. However, in
 16 *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed some limitations upon the
 17 discretion of this court to facilitate habeas petitioners' return to state court to exhaust claims. The
 18 *Rhines* Court stated:

19 [S]tay and abeyance should be available only in limited circumstances.
 20 Because granting a stay effectively excuses a petitioner's failure to present his
 21 claims first to the state courts, stay and abeyance is only appropriate when the
 22 district court determines there was good cause for the petitioner's failure to exhaust
 23 his claims first in state court. Moreover, even if a petitioner had good cause for that
 24 failure, the district court would abuse its discretion if it were to grant him a stay
 25 when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2)
 ("An application for a writ of habeas corpus may be denied on the merits,
 notwithstanding the failure of the applicant to exhaust the remedies available in the
 courts of the State").

26 *Rhines*, 544 U.S. at 277.

1 Because the petition is a mixed petition containing exhausted and unexhausted claims,
 2 it is subject to dismissal by this court. Prior to dismissing this case, however, petitioner will be
 3 provided the following three options:

- 4 1. He may submit a sworn declaration voluntarily abandoning the unexhausted
 claim in his federal habeas petition, and proceed only on the exhausted claim;
- 5 2. He may return to state court to exhaust his unexhausted claim, in which case
 his federal habeas petition will be denied without prejudice but will not be
 stayed during his return to state court; or
- 6 3. He may file a motion, pursuant to the requirements of *Rhines*, asking this court
 to stay and abey his exhausted federal habeas claim while he returns to state
 court to exhaust his unexhausted claim.

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 8 Petitioner's failure to choose any of the three options listed above will result in his federal habeas
 9 petition being dismissed. Petitioner is also advised to familiarize himself with the limitations periods
 10 for filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations periods may
 11 have a direct and substantial effect on whatever choice he makes regarding his petition.
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13 IV. Conclusion

14 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (Docket #18)
 15 is **GRANTED**, as follows: **Grounds three through nineteen, contained in the**
 16 **supplemental/amended petition (Docket #24) are DISMISSED as untimely. Ground one of the**
 17 **original petition is exhausted. Ground two of the original petition is unexhausted.**

18 **IT IS FURTHER ORDERED** that petitioner shall have thirty (30) days to do one
 19 of the following: **(1)** inform this court in a sworn declaration that he wishes to formally and forever
 20 abandon the unexhausted ground for relief in his federal habeas petition (ground two), and proceed
 21 on the remaining ground (ground one); **OR (2)** inform this court in a sworn declaration that he
 22 wishes to dismiss this petition without prejudice in order to return to state court to exhaust his
 23 unexhausted claim; **OR (3)** file a motion pursuant to the requirements of *Rhines v. Weber*, 544 U.S.
 24 269 (2005), asking this court to hold his exhausted claims in abeyance while he returns to state court
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1 to exhaust his unexhausted claim. If petitioner chooses to file a motion pursuant to *Rhines v. Weber*,
2 respondents may respond to such motion as provided in Local Rule 7-2.

3 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted
4 ground, respondents shall have **thirty (30) days** from the date petitioner serves his declaration of
5 abandonment in which to file an answer or response to petitioner's remaining ground for relief.
6 Petitioner shall thereafter have **twenty (20) days** following service of respondents' answer in which
7 to file a reply.

8 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within
9 the time permitted, this case may be dismissed.

10 Dated this 2nd day of February, 2009.

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13 UNITED STATES DISTRICT JUDGE

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